

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARCUS EUGENE KIDD,

Defendant-Appellee.

UNPUBLISHED

June 21, 2011

No. 297244

Berrien Circuit Court

LC No. 09-015984-FC

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

In this case, defendant Marcus Eugene Kidd was convicted by jury of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felony firearm, MCL 750.227b, assault with intent to do great bodily harm less than murder MCL 750.84, and assault with a dangerous weapon, MCL 750.82. He was sentenced to prison as a fourth habitual offender for 30 to 50 years for armed robbery, 26 to 50 years for first-degree home invasion, two years for felony firearm, three to 50 years for assault with intent to do great bodily harm less than murder, and four to 15 years for assault with a dangerous weapon. He now appeals as of right. We affirm.

On June 20, 2009, defendant and his accomplice Charles Howell approached James Gillette, an 81-year-old man mowing his lawn in front of his rural home. Defendant shot Gillette in the leg and took Gillette's wallet and credit cards, and forced Gillette inside. When Gillette was unable to tell defendant his debit card personal identification number, defendant shot at Gillette again, this time striking a lamp near Gillette's head. Then defendant pulled Gillette's telephone out of the wall and he and Howell fled.

After defendant and Howell left Gillette's house, they drove to a gas station in South Bend, Indiana. They used Gillette's credit card to buy two cartons of Newport cigarettes and to buy gas. Next, the two men went to Wal-Mart, where they made some small purchases with Gillette's credit card, and then bought a flat-screen television. Then they went to a Meijer store where they purchased three \$100 gift cards with Gillette's credit card. They attempted to buy more gift cards, but the transaction was refused when they could not provide identification to the cashier that matched the name on the credit card. Howell and defendant then went to Wal-Mart again and tried to purchase another flat-screen television, but the transaction was declined, as was another attempt to use the card at a 7/11 convenience store.

First, defendant argues that the photographic lineup presented to the victim was unduly suggestive, and resulted in the victim misidentifying defendant at trial. We disagree.

This issue was unpreserved because defendant did not raise this argument in the trial court. This Court reviews it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999).

Michigan State Police Trooper John Moore testified that he was dispatched to investigate the crimes in this case. During his investigation, he obtained photographs of Howell and defendant, and went to Gillette's home and presented Gillette with photographic lineups. Gillette and Moore sat down at Gillette's kitchen table, and Moore presented Gillette with a group of photographs that contained defendant's picture. Gillette selected defendant's photograph. As Moore packed up his materials and left, and told Gillette, "[g]ood job that's our guy."

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). An unduly suggestive pretrial identification procedure precludes an in-court identification unless the witness has an independent basis for the in-court identification. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). The relevant inquiry is whether the lineup was unduly suggestive in light of all the circumstances surrounding the identification. *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).

At trial, each time Gillette was asked if he could identify defendant as the man who shot him and robbed him, Gillette could not identify defendant. He repeatedly stated, both at the preliminary examination and at trial, that he could not say for sure that defendant was the man who had victimized him. In fact, Gillette even stated that he did *not* believe defendant was his assailant. Because Gillette never actually identified defendant in court, the procedure used during the photographic lineup is of no moment, and defendant's argument is groundless.

Next, defendant argues that his convictions were not supported by sufficient evidence that he was the person who committed the crimes. We disagree.

This Court reviews challenges to the sufficiency of evidence in criminal trials de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence presented at trial in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Howell testified that defendant participated in the commission of the crimes against Gillette. Howell stated that he and defendant were driving his white Mercury Sable when it

began to overheat. He stopped in front of Gillette's house to ask for water. Defendant followed Gillette into the garage, and then Howell heard a gunshot. Defendant ordered Gillette into the house. Defendant asked Gillette for his wallet and then pushed Gillette down into a chair. Defendant shot at a lamp next to Gillette's head. And defendant tore Gillette's phone from the wall. Then he and defendant both used Gillette's credit card to make purchases at various stores after they left his house.

In reviewing the sufficiency of the evidence, this Court is careful not to interfere with the jury's role as the sole judge of the facts. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). It is for the trier of fact, not the appellate court, to determine the credibility of witnesses and what inferences may be fairly drawn from the evidence, as well as the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). If the jury believed Howell's testimony, it was sufficient to establish that defendant was the one who committed the crimes for which he was convicted.

Furthermore, when the police caught defendant, he had cartons of Newport cigarettes, rubber gloves, credit cards belonging victims of another robbery, and a shirt that looked very similar to one observed by police on surveillance footage from the credit card purchases at Wal-Mart. Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *Carines*, 460 Mich at 757. We conclude that there was sufficient evidence to support defendant's identity as the perpetrator of the crimes for which he was convicted, and sufficient evidence to support his convictions.

Finally, defendant argues that the prosecutor in this case committed prosecutorial misconduct. We disagree.

Defendant failed to object to any instances of alleged prosecutorial misconduct, therefore this issue is not preserved. We review defendant's unpreserved claim of prosecutorial misconduct for plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 453–454; 678 NW2d 631 (2004).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, evaluating the prosecutor's conduct in context of the entire record. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

Defendant lists four different examples of alleged prosecutorial misconduct within his question presented. However, the analysis section of this issue does not correspond to those four issues. He offers no legal analysis, factual support, or even commentary on most of the issues. Defendant's failure to discuss, explain or rationalize his arguments constitutes abandonment of the issues. *People v Anderson*, 209 Mich App 527, 538, 531 NW2d 780 (1995); see also *People v Kelly*, 231 Mich App 627, 640-641, 588 NW2d 480 (1998) (an appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment to an issue with little or no citation of supporting authority).

Defendant contends that there were some statements made by the prosecutor that

amounted to unsworn testimony that are missing from the trial transcript. He offers no proof of this, and it appears that the trial transcript contained the entirety of the prosecutor's closing arguments. A review of the record does not indicate that the prosecutor gave unsworn testimony, either during closing arguments, or at another stage of these proceedings. This issue has no merit.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Peter D. O'Connell

/s/ Donald S. Owens